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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

11 UNITED STATES OF AMERICA,

12   Plaintiff,   Case No. CR05-270L

13   v.   ORDER DENYING MOTION TO
                                               EXCLUDE PROFFER
14 COLUMBIA MEDICAL SYSTEMS, INC.,
    PHU NGUYEN, TUYET NGUYEN, and
15 SESS MERKE,

16   Defendants.

17   This matter comes before the Court on "Defendant Sess Merke's Motion to Exclude his

18 Proffer at Trial" (Dkt. # 69). Merke is charged, along with three co-defendants, in a conspiracy

19 to transport stolen goods across state lines. Merke now moves to exclude information from an

20 interview he gave to the government pursuant to a proffer agreement.

21   By all accounts, Sess Merke played a minor role in the alleged conspiracy. As a result,

22 the government sought his cooperation with their case against his co-defendants, Tuyet Nguyen,

23 Phu Nguyen and Columbia Medical Systems ("CMS"). Merke and the government arrived at a

24 proffer agreement that stated that the information would not be used directly in the trial, but

25 could be used for impeachment, to track down other evidence (derivative use), at sentencing, and

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1 would have to be turned over to his co-defendants if it contained <u>Brady</u> material. Shortly after

2 they received the proffer from Merke, they provided it to his co-defendants. Merke now moves

3 to prevent the government from using the proffer for any purpose, arguing that the government's

4 action violated the agreement.

5   The government's proffer agreement with Merke simply does not contain the stipulation

6 that Merke claims in his motion. Merke argues that the government's agreement not to share the

7 information with his co-defendants is implied by this provision:

8   8. **Brady Discovery**: Your client understands that *Brady v. Maryland* and its progeny

9   require that the government provide any charged defendant all information known to the
government that tends to mitigate or negate such defendant's guilt. Should your client's
proffer contain *Brady* material, the government will be required to disclose this

10   information to the appropriate defendants.

11 Motion at Ex. B. Merke argues that this provision implies that "unless the proffer contains

12 *Brady* material, it may not be disclosed to co-defendants." Reply at 2. This argument is

13 unavailing. The implication of this provision is only that if there is no <u>Brady</u> material in the

14 proffer, the government will not be *required* to turn over the information, *but it still may do so*

15 *voluntarily*.

16   A similar implication is expressed in the "No Direct Use" provision, which states that the

17 information "may not be used in the government's case-in-chief against your client." This

18 provision is fairly read to allow any non-direct use, including voluntarily sending the

19 information to Merke's co-defendants. As such, the Court does not interpret the subsequent list

20 of potential uses (e.g., impeachment, derivative, sentencing) as an exhaustive list; rather, these

21 provisions detail some of the potential non-direct uses available to the government.

22   The Court also accepts the government's <u>Brady</u> justification. The government correctly

23 identified possible <u>Brady</u> materials in Merke's proffer. Merke's co-defendants should have the

24 opportunity to decide whether to use the information in the proffer for their defense. While the

25 mitigatory impact of some of the information disclosed is arguable, the government must

26 "resolve doubtful questions in favor of disclosure." <u>United States v. Acosta</u>, 357 F.Supp.2d

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1   1228, 1242 (D. Nev. 2005). Furthermore, disclosure of the entire document is appropriate

2   pursuant to the "rule of completeness." Fed. R. Evid. 106.

3   For the foregoing reasons, IT IS HEREBY ORDERED that defendant Merke's motion to

4   exclude his proffer (Dkt. # 69) is DENIED.

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6   DATED this 10th day of March, 2006.

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8   _____
           Robert S. Lasnik
9   United States District Judge

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